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Article (Accepted Version)

Guntrip, Edward (2018) International investment law in an isolationist world: a human rights perspective. Human Rights and International Legal Discourse, 12 (2). pp. 138-152. ISSN 1783-7014

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# **International Investment Law in an Isolationist World: A Human Rights Perspective**

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# **International Investment Law in an Isolationist World: A Human Rights Perspective**

## **Abstract:**

Political events in 2016 marked a fundamental shift in the world order. The scale of the shift has precipitated claims that the world has entered into a new international order characterised by isolationist policies. This article addresses the validity of these claims with regards to international investment law. The article adopts a human rights perspective to argue that isolationist State conduct in international investment law can often be justified as an exercise of the right to economic self-determination. As the right to self-determination has been invoked in debates regarding international investment law since the 1960s and 1970s, it is suggested that some isolationist State practice is merely the latest manifestation of on-going policy tensions within the international investment law regime.

## **Keywords:**

Human Rights; International Investment Law; Investment Arbitration; Isolationism; Self-Determination.

## **1. Introduction**

In 2016, the United Kingdom's referendum result in favour of leaving the European Union (Brexit) and the election of Donald Trump as the President of the United States of America (USA) significantly altered the international political landscape. In response, it has been claimed that these events show support for policies that can be characterised as 'isolationist'.<sup>1</sup> Additionally, it has been alleged that the current trend

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<sup>1</sup> J. R. Murnane, Let's Not Get Distracted by "Shiny Objects," President Trump's "America First" Foreign Policy is Out of Sync with the Problems of the 21st Century, *American Diplomacy* 31 March 2016; accessed at [http://www.unc.edu/depts/diplomat/item/2017/0106/oped/murnane\\_shiny.html](http://www.unc.edu/depts/diplomat/item/2017/0106/oped/murnane_shiny.html), 14 December 2017; B. Simms, America Alone, *New Statesman* 7-13 October 2016 24-5, 27, 29, 31; cf D. Blagden, Britain and the world after Brexit, 54(1) *International Politics* 1- 25 (2017).

towards ‘isolationist’ policies has resulted in the creation of a new world order.<sup>2</sup> This article examines the validity of these assumptions in relation to international investment law (IIL).

A wide variety of conduct associated with IIL has the potential to be labelled ‘isolationist’. The type of State conduct that is most susceptible to this criticism is that which seeks to promote the national interest of the State to the detriment of IIL and the flow of foreign direct investment (FDI). A State might protect its national interest by modifying treaty terms to limit investment protection standards, by restricting foreign investors’ access to dispute resolution mechanisms or by withdrawing from international investment agreements (IIAs) altogether. These types of actions undermine how IIL was envisaged to function and can therefore be understood to be ‘isolationist’ from the viewpoint of IIL.<sup>3</sup> This article asserts that changes to IIL aimed at protecting the national interest may be justified by reference to the human rights framework, and in particular, the right to economic self-determination. When a State’s population elects to adopt an economic policy that is contrary to IIL, the right to self-determination, when understood as a group right, can provide a State with a mandate to apply that policy. As such, it is doubtful whether State practice relating to IIL that seeks to protect the national interest can automatically be classified as ‘isolationist’. Further, the right to self-determination played a significant role in the development of the contemporary IIL regime.<sup>4</sup> Therefore, when a human rights perspective is adopted, it becomes questionable whether State practice that prioritises the national interest has generated a ‘new’ international order.

To explore these issues, this article will address what is understood by the term ‘isolationism’ before explaining how this concept relates to the right to

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<sup>2</sup> F. Fukuyama, US against the world? Trump’s America and the new global order, *Financial Times* 12 November 2016.

<sup>3</sup> See Section 2 below.

<sup>4</sup> M. Salomon, From NIEO To Now and the Unfinishable Story of Economic Justice, 62(1) *International and Comparative Law Quarterly* 38 (2013); S. Subedi, *International Investment Law: Reconciling Policy and Principle* 38 (Oxford: Hart Publishing 2016); E. Guntrip, Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law, 65(4) *International and Comparative Law Quarterly* 839-841 (2016).

economic self-determination. Examples will be used to explain how recent State practice in IIL, that might be deemed to be isolationist, can be validated by reference to the right to self-determination. Finally, the article will consider the degree to which the phenomenon that has been identified can be described as new, or whether, as this author suggests, this is the latest manifestation of an on-going policy tension in IIL.

## 2. An 'Isolationist World'

The nationalistic agendas that underpinned the successful campaigns in both the Brexit referendum and the USA's Presidential election have given rise to claims that we have entered a new era of globalisation.<sup>5</sup> Although it remains unclear what characterises this new phase, the descriptions proffered suggest a reduction in international interactions between States.<sup>6</sup> Whilst this could be the outcome, it would be remiss to conclude that the world had become isolationist without reference to what is meant by the term 'isolationism'.

The concept of isolationism is notoriously difficult to define.<sup>7</sup> It is usually associated with the reluctance of a State to engage with other States<sup>8</sup> so as to promote

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<sup>5</sup> See for example, J. Tankersly, Britain's Brexit just killed globalisation as we know it, *The Sydney Morning Herald* 26 June 2016 accessed at <http://www.smh.com.au/world/us-election/britains-brexit-just-killed-globalisation-as-we-know-it-20160626-gps0js.html> 29 September 2017; R. Wigglesworth and M. Childs, Ray Dalio warns on new era of globalisation in retreat, *Financial Times* 15 November 2016 accessed at <https://www.ft.com/content/66427a0a-ab58-11e6-ba7d-76378e4fef24> 29 September 2017; L. Neville, Is This The End of Globalization?, *Global Finance* 8 December 2016, 10; A. Acharya, After Liberal Hegemony: The Advent of a Multiplex World Order, 31(3) *Ethics and International Affairs* 271-85 (2017).

<sup>6</sup> Tankersly, *supra* note 5; Wigglesworth and Childs, *supra* note 5; Neville, *supra* note 5; cf Acharya, *supra* note 5.

<sup>7</sup> M. Roskin, What "New Isolationism"? 6 *Foreign Policy* 118 (1972); D. H. Dunn, Isolationism Revisited: Seven Persistent Myths in the Contemporary American Foreign Policy Debate 31 *Review of International Studies* 240 (2005); J. S. Rofer, Isolationism and Internationalism in Transatlantic Affairs 9 *Journal of Transatlantic Studies* 4-5 (2011).

<sup>8</sup> A. Quinn, The Great Illusion: Chimeras of Isolationism and Realism in Post-Iraq U.S. Foreign Policy 35 *Politics & Policy* 527 (2007); A. Johnstone, Isolationism and Internationalism in American Foreign Relations 9 *Journal of Transatlantic Studies* 10 (2011).

its own national agenda. As a result of its nationalistic associations,<sup>9</sup> the term is often used pejoratively.<sup>10</sup> However, any definition of isolationism is subject to contextual interpretation.<sup>11</sup> For example, the USA's non-interventionist foreign policy with Europe during the 1930s is frequently cited as an accepted example of isolationist conduct.<sup>12</sup> Whilst the USA did not engage with the rise of fascism in Europe at this time, it still retained strong economic ties in the international arena.<sup>13</sup> Consequently, the definition of isolationism can be tailored to reflect non-engagement in only certain aspects of international affairs. Further, isolationism is relative.<sup>14</sup> One policy may be more isolationist than another, but if both rely on international co-operation to varying degrees, it may not be accurate to describe either as isolationist (not at least without reference to any comparator). This relativity has resulted in claims of isolationism being directed towards liberal States as well as authoritarian regimes.<sup>15</sup> Given these considerations, it is only possible to propose a generic, working definition of isolationism. For the purposes of this article, isolationism refers to when a State seeks to protect its national interest above the interests of the international community. This could be evidenced by States relying on their national interests as a justification for not engaging in the international arena, or citing domestic reasons for acting in a manner that is incompatible with the aims of their international obligations.

Based on this definition, IIL evidences some isolationist practices. For example, the Trump administration has walked away from two mega-regional trade and investment agreements (the Trans Pacific Partnership and the Transatlantic Trade and Investment Partnership) and is renegotiating the terms of the North American Free Trade Agreement.<sup>16</sup> Trump's policy can be considered to be isolationist given

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<sup>9</sup> Quinn, *supra* note 8, p. 528; Rofe, *supra* note 7, p. 2.

<sup>10</sup> Roskin, *supra* note 7, p. 118; Dunn, *supra* note 7, p. 243; Quinn, *supra* note 8, p. 527; Johnstone, *supra* note 8, p. 7.

<sup>11</sup> Rofe, *supra* note 7, p. 5.

<sup>12</sup> Dunn, *supra* note 7, p. 255; Quinn, *supra* note 8, p. 527; Johnstone, *supra* note 8, p. 9.

<sup>13</sup> Johnstone, *supra* note 8, p. 9.

<sup>14</sup> Roskin, *supra* note 5, pp. 118 – 119; Dunn, *supra* note 7, p. 242.

<sup>15</sup> See H. Turku, *Isolationist States in an Interdependent World* ch 2 (Farnham: Ashgate 2009).

<sup>16</sup> United States Trade Representative, 2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program March 2017 accessed at

that the USA's retraction from these instruments was explained by reference to the need for the USA to focus on domestic policies and to prioritise American-based industries.<sup>17</sup> The denunciation of the Washington Convention<sup>18</sup> by Bolivia, Ecuador, and Venezuela<sup>19</sup> on the grounds that investment arbitration removed State control over natural resources<sup>20</sup> is also illustrative of a form of isolationism. A further example is Australia's policy to completely exclude investment arbitration from new IIAs from April 2011 to September 2013.<sup>21</sup> Australia's actions can be understood to be isolationist they could have reduced inward flows of FDI given the lack of a neutral, international dispute resolution forum to hear investment disputes. Such an approach undermines the teleology of IIL.

The implementation of isolationist policies such as these can be explained by reference to the global, neoliberal practices that drive the operation of IIL.<sup>22</sup> Neoliberal economic policy dictates that the market will allocate resources in the most efficient manner.<sup>23</sup> Globalisation provided the context in which neoliberalism could

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<https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>

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September 2017.

<sup>17</sup> *ibid*, 1-2.

<sup>18</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (Washington Convention).

<sup>19</sup> Bolivia's withdrawal from the Washington Convention took effect on 3 November 2007. Ecuador's withdrawal from the Washington Convention took effect on 7 January 2010. Venezuela's withdrawal from the Washington Convention took effect on 25 July 2012.

<sup>20</sup> For a full explanation, see S. K. Fiezzoni, The Challenge of UNASUR Member Countries to Replace ICSID Arbitration 2 Beijing Law Review 134 (2011).

<sup>21</sup> L. E. Trakman and D. Musayelyan, The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration 31 ICSID Rev-FILJ 196 (2016); Edwina Khan, Australia's Conflicting Approach to ISDS: Where to From Here? Kluwer Arbitration Blog 4 June 2015 accessed at <http://arbitrationblog.kluwerarbitration.com/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/> 29 September 2017.

<sup>22</sup> M. Sornarajah, Resistance and Change in the International Law on Foreign Investment (Cambridge: Cambridge University Press 2015).

<sup>23</sup> *ibid*, 10-11; S. A. Spears, The Quest for Policy Space in a New Generation of International Investment Agreements 13(4) Journal of International Economic Law 1041(2010).

operate on an international scale.<sup>24</sup> When applied to IIL, neoliberalism seeks to encourage the flow of FDI on a global scale, protect property rights and provide for neutral dispute settlement.<sup>25</sup> To encourage investment flows, the IIL regime, through the use of IIAs,<sup>26</sup> confers investment protection standards on foreign investors<sup>27</sup> and enables foreign investors to commence investment arbitration directly against the host State in the event of a dispute.<sup>28</sup> This structure was intended to encourage FDI flows to those States that enter into IIAs.<sup>29</sup> However, the interpretation of investment protection standards, combined with the power conferred upon foreign investors to challenge host State decisions, have resulted in a backlash against IIL.<sup>30</sup> In particular, IIL has been criticised for investment awards that outline generous interpretations of investment protection standards in favour of foreign investors, which often give rise to an obligation on the host State to pay substantial damages.<sup>31</sup> Host States are often unable to defend themselves against foreign investors' claims as IIAs are asymmetrical and very rarely create obligations for foreign investors that can be invoked by host States.<sup>32</sup> Hence, States act in a variety of ways to protect their national interests against the potentially negative repercussions of being bound by IIL. This has the effect of undermining the objectives of the IIL regime and can negatively impact the flow of FDI. As a result, these actions are deemed to be isolationist.

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<sup>24</sup> Sornarajah, *supra* note 22, p. 11; S.W. Schill, *The Multilateralization of International Investment Law* 6 (Cambridge: Cambridge University Press 2009).

<sup>25</sup> Sornarajah, *supra* note 22, p. 12-13. Schill, *supra* note 24, p. 6.

<sup>26</sup> S. Subedi, (2016) *International Investment Law: Reconciling Policy and Principle* 114-115 (Oxford: Hart Publishing, 2016).

<sup>27</sup> Sornarajah, *supra* note 22, p. 14; R. Dolzer, and C. Schreuer, *Principles of International Investment Law* 14 (Oxford: Oxford University Press, 2012).

<sup>28</sup> *ibid.*

<sup>29</sup> Sornarajah, *supra* note 22, p. 14; L. Cotula, *The New Enclosures? Polanyi, International Investment Law and the Global Land Rush* 34(9) *Third World Quarterly* 1614 (2013).

<sup>30</sup> M. Waibel, A. Kaushal, K.-H. Chung and C. Balchin (eds) *The Backlash Against Investment Arbitration. Perceptions and Reality* (Alphen aan den Rijn: Kluwer Law International, 2009); A. Kulick, *Reassertion of Control: An Introduction*, in: A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* 7 (Cambridge: Cambridge University Press, 2016).

<sup>31</sup> M Sornarajah, *Introduction*, in: A. D. Mitchell, M. Sornarajah and T. Voon (eds), *Good Faith and International Economic Law* 4-5 (Oxford: Oxford University Press, 2015).

<sup>32</sup> A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 64 (Alphen de Rijn: Kluwer Law International, 2009).



Koskenniemi highlights investment arbitration as being particularly problematic within the IIL regime.<sup>33</sup> The asymmetrical nature of IIAs is identified as generating power differentials in investment arbitration.<sup>34</sup> The discrepancy in power between the foreign investor and the host State is internalised by the host State when formulating policy that has the potential to detrimentally affect investment projects.<sup>35</sup> This results in policies that are responsive to the possible outcomes of investment disputes, rather than those best suited to the specific circumstances that apply to the State. As a consequence of host States focussing on the international implications of their conduct, and more specifically their potential liability, local public power has become far less influential. This has resulted in the detachment of locally sourced democratic governance from IIL, and economic globalisation more generally.<sup>36</sup> State practice mirrors this description. The reasons articulated by the USA for distancing themselves from regional trade and investment treaties, and justifications proffered by those Latin American States that have denounced the Washington Convention, align with the sentiment that these States feel that they had ‘lost control’ over their economic policies by being party to key IIL treaties. Similarly, Australia’s rejection of investment arbitration was explained as a means of protecting its right to regulate in the public interest.<sup>37</sup> Therefore, isolationism in IIL is linked to the perceived, or actual, loss of influence over domestic economic policy. This is manifested within the structures of IIL, and in particular, the use of investment arbitration, which necessitates that decision-making is conducted externally to the State.

To re-engage with economic globalisation, it has been suggested that there must be enhanced public power and local self-determination in economic

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<sup>33</sup> M. Koskenniemi, *It’s Not the Cases, It’s the System* 18 *Journal of World Investment and Trade* 351 (2017).

<sup>34</sup> *ibid*, pp. 351-352; M.-L. Jaime, *Relying upon Parties;’ Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements* 46 *Georgetown Journal of International Law* 272 (2014).

<sup>35</sup> Koskenniemi, *supra* note 33, p. 352; D. Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* 114-115 (London: Palgrave Macmillan, 2016).

<sup>36</sup> Koskenniemi, *supra* note 33, p. 352.

<sup>37</sup> Khan, *supra* note 21.

governance.<sup>38</sup> By strengthening these procedures, both States and local communities are likely to feel that they are in control of globalisation, rather than being controlled by it. This approach may vindicate the implementation of isolationist policies in IIL at a domestic level. State practice that advances the national interest above FDI flows could be understood as embodying a move towards the re-claiming of local economic and democratic governance. If the reclaiming of local power in this manner is conceptualised as an exercise of the right to economic self-determination, it becomes questionable whether this type of conduct can be classified as isolationist.

To reframe isolationist State practice as an exercise of the right to economic self-determination, it is necessary to adopt a human rights perspective. The right to economic self-determination is recognised in Common Article 1 of the International Covenant on Civil and Political Rights<sup>39</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>40</sup> The centrality of the right to self-determination to the human rights regime is evident in claims that it amounts to an obligation *erga omnes*.<sup>41</sup> Therefore, framing economic self-determination as the exercise of a human right is not problematic. It is necessary to conceptualise the right to economic self-determination as a group right<sup>42</sup> so that the State can implement policies based on the exercise of this right in the international arena. This is achieved by linking the right to economic self-determination to the right to political self-determination. The right to economic self-determination entails that the local population must be given free choice to decide their preferred economic policy through the constitutional and political structures of the State,<sup>43</sup> which is usually

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<sup>38</sup> Koskeniemi, *supra* note 33, p. 352.

<sup>39</sup> International Covenant on Civil and Political Rights (signed on 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>40</sup> International Covenant on Economic, Social and Cultural Rights (signed on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

<sup>41</sup> ICJ 30 June 1995, Case Concerning East Timor (Portugal v. Australia) [1995] ICJ Rep 90, para 29.

<sup>42</sup> Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994) para 3.1. See also, B. Mello, Recasting the Right to Self-Determination: Group Rights and Political Participation 30(2) Social Theory and Practice 193 (2004).

<sup>43</sup> Guntrip, *supra* note 4, pp. 843-844.

achieved through the election of a representative government.<sup>44</sup> When informing the local population about the policies, the State must be transparent.<sup>45</sup> When the local population select their preferred economic approach through the applicable constitutional process, the State is conferred with a mandate to implement that economic strategy.<sup>46</sup> The right to economic self-determination is a continuing right, so the local population can change their mind and utilise the constitutional procedures of the State to evidence their newly preferred economic policy at a later stage.<sup>47</sup> As such, the right to economic self-determination is linked to the right to political self-determination, but focuses on the right of the population to select their preferred economic policy.<sup>48</sup> Most importantly for this note, the right to self-determination can support the adoption of an isolationist economic policy. If a State engages with their constitutional processes, and as a result receives a mandate to pursue an isolationist policy, the outcome can be justified on the basis of the population exercising their right to self-determination.

It is important to emphasise that not all isolationist policies are defensible by reference to the right to economic self-determination.<sup>49</sup> All elements of the right must be met. For example, there has been discussion as to whether Brexit was democratic in light of alleged misrepresentations made by both campaigns before the referendum.<sup>50</sup> Misrepresentations are unlikely to meet the transparency requirements

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<sup>44</sup> *ibid*, p. 844.

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid*, p. 845.

<sup>48</sup> *ibid*, p. 843.

<sup>49</sup> See D. Desierto, The Revived Debate over Development and Human Rights: Self-Determination, Sovereignty and Non-Discrimination, EJIL:Talk! blog 18 January 2018, accessed at <https://www.ejiltalk.org/the-revived-debate-over-development-and-human-rights-sequenced-or-selective-compliance/> 20 January 2018.

<sup>50</sup> See House of Commons Treasury Committee, The economic and financial costs and benefits of the UK's EU membership: First Report of Session 2016-17 26 May 2016 ch 2 accessed at <https://publications.parliament.uk/pa/cm201617/cmselect/cmtreasy/122/122.pdf> 29 September 2017; S. Tierney, Was the Brexit Referendum Democratic? United Kingdom Constitutional Law Association Blog 25 July 2016 accessed at <https://ukconstitutionallaw.org/2016/07/25/stephen-tierney-was-the-brexit-referendum-democratic/> 29 September 2017; A. Renwick and M. Russell, We need to talk about

associated with the right to self-determination. Nonetheless, in less controversial cases, State practice in IIL has been deemed to be isolationist by protecting the national interest to the detriment of the continued flow of FDI. The question then arises whether these practices are isolationist in the pejorative sense, or can be supported by reference to the right to economic self-determination. To examine this further, two recent examples of State practice in IIL will be used to highlight how the right to economic self-determination can be seen as a justification for what might otherwise be considered to be isolationist conduct.

### ***2.1 South Africa's Protection of Investment Act 2015***

FDI was viewed as an important aspect of South Africa's post-apartheid development. It was considered to be a means of triggering South Africa's economic growth and enabling South Africa to engage in the international economic arena.<sup>51</sup> However, by the late 1990s, it became apparent that the terms of the IIAs South Africa had negotiated were incompatible with its Constitution.<sup>52</sup> Further, South Africa's Broad Based Black Economic Empowerment Act,<sup>53</sup> which gave effect to an affirmative action plan intended to remedy the effects of apartheid, provided for positive discrimination contrary to the terms of investment protection standards in South Africa's IIAs.<sup>54</sup>

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our democracy The Constitution Unit 6 November 2016 accessed at <https://constitution-unit.com/2016/11/06/we-need-to-talk-about-our-democracy/> 29 September 2017.

<sup>51</sup> E. C. Schlemmer, An Overview of South Africa's Investment Treaties and Investment Policy 31 ICSID Rev-FILJ 168 (2016).

<sup>52</sup> Constitution of the Republic of South Africa (1996). See M. Mossallam, Process Matters: South Africa's Experience Exiting its BITs, The Global Economic Governance Programme Working Paper 2015/97 January 2015 7-8 accessed at [https://www.geg.ox.ac.uk/sites/geg/files/GEG%20WP\\_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf](https://www.geg.ox.ac.uk/sites/geg/files/GEG%20WP_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf) 29 September 2017.

<sup>53</sup> Act 53 (2003).

<sup>54</sup> Schlemmer, *supra* note 51, p. 173.

The initiation of the *Piero Foresti* claim<sup>55</sup> in 2007 highlighted South Africa's potential liability under its IIAs.<sup>56</sup> The basis of this claim was that the effect of the Mineral and Petroleum Resources Development Act 2004 amounted to expropriation, as it required the foreign investors to transfer shares to minority groups in accordance with South Africa's Black Economic Empowerment policies.<sup>57</sup> The claim was discontinued in 2010,<sup>58</sup> but in response, South Africa commenced a review of its FDI programme and its involvement in IIL more generally. The review was based on interviews with its international trade division and discussions with policy makers.<sup>59</sup> At this point, the review was opened for public comment and South Africa engaged with a range of stakeholders.<sup>60</sup> A final version of the review, taking into account stakeholder feedback, was considered by Cabinet.<sup>61</sup>

Based on the review, South Africa began to terminate its IIAs.<sup>62</sup> The intention was to replace them with domestic legislation that set out investment protection standards and dispute resolution procedures.<sup>63</sup> After some delay, this legislation took the form of the Protection of Investment Act 2015.<sup>64</sup> The Protection of Investment Act 2015 has significantly altered key aspects of how IIL usually functions. With regards to dispute resolution, foreign investors must exhaust all local remedies prior

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<sup>55</sup> ICSID, *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No ARB(AF)/07/1.

<sup>56</sup> Mossallam, *supra* note 52, p. 9.

<sup>57</sup> ICSID, 4 August 2010, *Piero Foresti, Laura de Carli and others v Republic of South Africa*, Award ICSID Case No ARB(AF)/07/1, accessed at <https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf> 20 January 2018, paras 54 and 78.

<sup>58</sup> *ibid*, para 82.

<sup>59</sup> R. Williams, *The Third Annual Forum of Developing Country Investment Negotiators Nothing Sacred: Developing Countries and the Future of International Investment Countries*, International Institute for Sustainable Development November 2009 5 accessed at [https://www.iisd.org/sites/default/files/material/developing\\_countries\\_and\\_the\\_future\\_of\\_IAs.pdf](https://www.iisd.org/sites/default/files/material/developing_countries_and_the_future_of_IAs.pdf) 29 September 2017.

<sup>60</sup> *ibid*.

<sup>61</sup> Mossallam, *supra* note 52, p. 12.

<sup>62</sup> *ibid*.

<sup>63</sup> Schlemmer, *supra* note 51, p. 189.

<sup>64</sup> Act 22 (2015).

to proceeding to arbitration<sup>65</sup> (a requirement that is either dispensed with entirely, or significantly reduced, in most IIAs). Exhausting local remedies can be time consuming for foreign investors, and may act as a disincentive to invest given the uncertainty associated with bringing an investment claim in foreign courts. Should this condition be complied with, arbitration is permitted, but only between the home State and the host State, with the consent of the South African Government.<sup>66</sup> To make use of this procedure, foreign investors would need to rely on diplomatic protection, which necessitates that their home State consents to bring a claim on behalf of a foreign investor. As a result, whether a claim is heard by an arbitral panel is at the discretion of the States involved, rather than being a right conferred upon foreign investors. This dispute resolution procedure applies to any new investments in South Africa.<sup>67</sup>

The Protection of Investment Act 2015 has been criticised for negatively impacting FDI flows. Members of the South African Chamber of Commerce and Industry,<sup>68</sup> the European Chamber of Commerce and the American Chamber of Commerce view the Protection of Investment Act 2015 as a deterrent to investment.<sup>69</sup> They are particularly critical of South Africa's approach given that South Africa is slipping down investment rankings as a desirable location for FDI and the incoming value of FDI has dropped significantly in recent years.<sup>70</sup> The essence of these critiques is that, by withdrawing from its IIAs, and creating a less attractive dispute resolution system for foreign investors, South Africa is prioritising its national interest over FDI flows and the IIL regime as a whole. Hence, these views imply that South Africa is being isolationist.

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<sup>65</sup> *ibid*, s.12(5).

<sup>66</sup> *ibid*.

<sup>67</sup> *ibid*, s.15.

<sup>68</sup> Mossallam, *supra* note 52, pp. 5, 15-16.

<sup>69</sup> M. Masamba, South Africa's new investment law: Safe hands?, This is Africa 23 February 2016 accessed at <http://www.thisisafricaonline.com/News/South-Africa-s-new-investment-law-Safe-hands?ct=true> 29 September 2017.

<sup>70</sup> D. Thomas, Business frets over South Africa law, African Business March 2016 20-21.

However, by taking a human rights perspective, South Africa's actions can be framed as the exercise of the right to economic self-determination. Following a transparent review of its obligations in IIL,<sup>71</sup> South Africa has taken the decision to focus on its social policies at the expense of attracting FDI. It has achieved this through the enactment of domestic legislation in accordance with its Constitution. It has been claimed that this Act was not the subject of full parliamentary consultation.<sup>72</sup> This may be problematic as, if this is correct, it may reduce the democratic legitimacy of the Act. Nevertheless, through consultations and the legislative process, the local population was able to engage with the formulation of economic policy, both directly and through the operation of democratically appointed representatives. Therefore, the adoption of the Protection of Investment Act 2015 can be justified as an act of self-determination.

## ***2.2. Wallonia and the EU-Canada Comprehensive Economic and Trade Agreement***

When the European Commission declared the EU-Canada Comprehensive Economic and Trade Agreement (CETA) to be a mixed agreement, it triggered the requirement that all European Union (EU) Member States agree to CETA in order for it to apply in its entirety.<sup>73</sup> The procedure to be followed by Member States to consent to mixed agreements is governed by their Constitution.<sup>74</sup> The Belgian Constitution confers power over regional economic matters to its regional parliaments.<sup>75</sup> Consequently, for

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<sup>71</sup> Mossallam, *supra* note 52, p. 17.

<sup>72</sup> Schlemmer, *supra* note 51, p. 189; Thomas, *supra* note 70.

<sup>73</sup> European Commission, European Commission proposes signature and conclusion of EU-Canada trade deal, 5 July 2016 accessed at [http://europa.eu/rapid/press-release\\_IP-16-2371\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2371_en.htm) 29 September 2017.

<sup>74</sup> European Parliament, Ratification of international agreements by EU Member States, Briefing November 2016 accessed at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593513/EPRS\\_BRI\(2016\)593513\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593513/EPRS_BRI(2016)593513_EN.pdf) 29 September 2017.

<sup>75</sup> See Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47, Declaration 51 'Declaration by the Kingdom of Belgium on national Parliaments' which states that 'Belgium wishes to make clear that, in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary

the federal Belgian Government to agree to CETA, it needed the agreement of all of its regional parliaments.

In 2016, the Parliament of Wallonia expressed concerns over terms of CETA. In particular, it was unclear of the potential implications for farmers in the region.<sup>76</sup> These apprehensions appeared to reflect issues regarding the distribution of wealth from the agreement, as the Wallonian economy, which had historically been based around farming and industry, was in decline.<sup>77</sup> The Parliament also expressed wider concerns regarding the provisions in CETA addressing environmental and labour standards,<sup>78</sup> as well as the inclusion of an investment court as the forum for disputes.<sup>79</sup> The overall debate may have resulted from a sentiment that Belgium had engaged in little democratic debate over free trade and the impact of globalisation more generally.<sup>80</sup> Based on these issues, on 14 October 2016, the Parliament of Wallonia voted against accession to CETA.<sup>81</sup> In an attempt to clarify the scope of the provisions, and to explain how CETA would function, an interpretative declaration was provided, but the regional assembly remained unsatisfied.<sup>82</sup> Further minor modifications were made to the text of CETA and it was not until 28 October 2016 that the Parliament's concerns were addressed and CETA was accepted.<sup>83</sup>

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assemblies of the Communities and the Regions act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national Parliament.'

<sup>76</sup> V. Dendrinou and V. Pop, Upstart Belgian Region Stymies EU, Canada Trade Deal; Wallonia's refusal to approve CETA thwarts bloc's ability to negotiate multinational economic agreements, Wall Street Journal 21 October 2016.

<sup>77</sup> S. Hayden, Why Wallonia wobbled, Maclean's 14 November 2016.

<sup>78</sup> J Brunsden, Belgium's Walloon parliament blocks EU-Canada free-trade deal FT.com 14 October 2016 accessed at <https://www.ft.com/content/df6841f4-113e-3b56-9559-61bcc6c3ed11?mhq5j=e7> 1 October 2017; Anon, Hot-air Walloons; The Canada-EU trade deal, The Economist 22 October 2016 46.

<sup>79</sup> Dendrinou and Pop, *supra* note 76; Anon, *supra* note 78.

<sup>80</sup> Dendrinou and Pop, *supra* note 76.

<sup>81</sup> 46 against accession, 16 for, with 1 abstention.

<sup>82</sup> Brunsden, *supra* note 78; N. Drozdiak, V. Pop and V. Dendrinou, EU Sets Belgium an Ultimatum on CETA; EU-Canada trade deal has been blocked by Belgian region of Wallonia, Wall Street Journal 23 October 2016.

<sup>83</sup> Hayden, *supra* note 77.



The stance taken by the Parliament of Wallonia was widely criticised. It was alleged that the Walloons were failing to comprehend the wider context in which CETA was operating.<sup>84</sup> Critics argued that sovereignty and democracy must be compromised so as to gain the benefits of globalisation.<sup>85</sup> Based on the regional assembly's conduct, it was suggested that power should be shifted back to Brussels to prevent regional parliaments from blocking consent to beneficial treaties, such as CETA.<sup>86</sup> The foundation of these critiques is that Wallonia was taking an isolationist view to protect the interests of the Walloons that prevented Belgium, and the EU, from gaining the benefits of CETA.

However, the acts of the Parliament of Wallonia can also be understood as the exercise of the right to economic self-determination. The regional assembly is conferred with power over the region's economic and international trade matters. Therefore, the regional assembly acted in accordance with the powers conferred upon it by the Belgian Constitution. The position taken by the Parliament was reflective of the broader views of the region that it represented.<sup>87</sup> As such, it possessed the mandate to, at a minimum, query how the terms of CETA would impact the community that it represented. It was only when it was satisfied with the outcome of these discussions that it agreed to the terms of CETA. Hence, by taking a human rights standpoint, Wallonia's isolationist behaviour can be understood as the exercise of the right to self-determination.

### ***2.3 Isolationism as Self-Determination***

The dynamics that underpin the operation of IIL can lead to States choosing to act contrary to IIL's purposes in an attempt to control their domestic economic policies. These practices can be attributed to the detachment that has arisen between local level governance and the process of economic globalisation. If isolationist State conduct is understood as a means of regaining control, it is possible to re-frame State actions as the exercise of the right to economic self-determination. The two examples outlined

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<sup>84</sup> Anon, Making sense of the Wallonian veto, *The Economist* 24 October 2016.

<sup>85</sup> *ibid*; Anon, *supra* note 78.

<sup>86</sup> Anon, *supra* note 84.

<sup>87</sup> Hayden, *supra* note 77.

above illustrate how the right to economic self-determination can provide an alternative rationale for isolationist actions. In each instance, conduct that sought to protect a State's national interest may be deemed by some to be isolationist as it could deter foreign investors and reduce global flows of FDI. However, if a human rights viewpoint is adopted, the same practices can be justified by reference to the right to economic self-determination. Consequently, it is a matter of perspective as to whether acting in the national interest in IIL amounts to isolationism, or can be considered to be the exercise of the right to economic self-determination.

### **3. A 'New International Order'?**

If isolationist behaviour in IIL is linked to the right to economic self-determination, the further issue arises as to whether this results in a 'new international order'. The development of the IIL regime exhibited on-going tension between the goals of encouraging FDI and protecting the national interest. As such, current State practice may be the latest manifestation of a historical trend within this field of international law.

The protection of the national interest was most prominent during the New International Economic Order (NIEO) in the 1960s and 1970s. In response to decolonisation, newly independent States sought to achieve economic independence in addition to their political independence.<sup>88</sup> Collectively, newly independent States used their numerical advantage in the United Nations to pass General Assembly resolutions to pursue their aims.<sup>89</sup> The right to self-determination was expressly referenced in the text of these resolutions to justify their right to expropriate foreign investments.<sup>90</sup> Although the NIEO never materialised, the use of a central human

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<sup>88</sup> Guntrip, *supra* note 4, p. 839.

<sup>89</sup> UNGA, Declaration on the Establishment of a New International Economic Order, (A/RES/S-6/3201); UNGA, Programme of Action on the Establishment of a New International Economic Order (A/RES/S-6/3202); UNGA, Charter of Economic Rights and Duties of States, (A/RES/29/3281).

<sup>90</sup> UNGA, Declaration on the Establishment of a New International Economic Order, (A/RES/S-6/3201) arts 4(a), 4(d), 4(e); UNGA, Programme of Action on the Establishment of a New International Economic Order (A/RES/S-6/3202) section VIII; UNGA, Charter of Economic Rights and Duties of States, (A/RES/29/3281) arts 1, 2(1).

right as the legal foundation for their claims set the scene for what would be an on-going policy battle within IIL between encouraging the flow of FDI and maintaining sufficient policy space for States to act in the national interest.

The current wave of ‘isolationist’ conduct arises in a different context to that which existed at the time that States pursued the creation of the NIEO. The on-going process of decolonisation provided a unifying factor amongst States with otherwise divergent interests.<sup>91</sup> As such, there was a singular, shared ‘national’ interest, which was economic independence. Each State’s national interests have become far more nuanced in the 50 years since the NIEO was proposed. During the NIEO, capital exporting States were primarily developed States, meaning that newly independent States were potentially subject to exploitation.<sup>92</sup> Investment flows are now far more dispersed with investment flows occurring between developing States and between developed States.<sup>93</sup> Consequently, the divide between developing and developed States within the IIL regime is less clear-cut. Nevertheless, the foundational elements of the current ‘isolationist’ policies are fundamentally similar to that found during the NIEO. States are seeking to act in a manner that reflects their particular economic, political, cultural and social situations. Although these situations vary from State to State, in essence, States wish to feel in control of how they develop without outside interference. The right to self-determination gives effect to this sentiment by enabling a State’s population to decide what policies are most appropriate to achieve the State’s goals. As a result, the examples discussed above are merely new manifestations of the same concerns expressed during the NIEO, but in response to different pressures.<sup>94</sup>

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<sup>91</sup> J. Toye, *Assessing the G77: 50 years after UNCTAD and 40 years after the NIEO*, 35 *Third World Quarterly* 1767 (2014).

<sup>92</sup> See L. S. Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*, 30 *Northwestern Journal of International Law & Business* 103-108 (2010).

<sup>93</sup> K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* 91 (Cambridge: Cambridge University Press 2013); Y Radi, *International Investment Law and Development: A history of two concepts*, in: S.W. Schill, C. J. Tams and R. Hofmann (eds), *International Investment Law and Development: Bridging the Gap* 86 (Cheltenham/Northampton: Edward Elgar Publishing, 2015).

<sup>94</sup> This is not to suggest that the colonial foundations of the modern IIL regime are no longer relevant.

Consequently, whether a new world order has resulted depends on how you define 'new'. Aspects of the current wave of States protecting their national interests differ to the previous incarnations. The process of decolonisation is less of a unifying experience for States 50 years later and the flow of FDI has become more dispersed. However, at the essence of IIL practice, there remains an on-going tension between encouraging investment flows and the right to self-determination. Current State practice is merely the latest manifestation of these competing policy views in IIL.

#### **4. Conclusions: Isolationism in International Investment Law from a Human Rights Perspective**

Whether it is accurate to describe State practice that undermines the operation of IIL as isolationist is a matter of perception. When isolationism is understood as prioritising the national interest above international obligations to encourage the flow of FDI, isolationist practices do exist in IIL. However, if a human rights perspective is adopted, the right to self-determination provides a framework that can reformulate how 'isolationist' practices are understood. The use of human rights in this manner is not new. It formed the foundation of the modern IIL regime when it was raised during discussions regarding the NIEO. Current discussions regarding isolationism form part of the on-going debate in IIL.

Despite the consistent role of the right to self-determination in the development of IIL, it often goes unrecognised. This is because State conduct in IIL is not regularly considered from a human rights viewpoint. Acknowledging the role that perspective can play in categorising State conduct in IIL can potentially lead to reform. In a fragmented international legal order, it is necessary to take into account the competing aims of the regimes in international law to produce coherence. This requires an understanding that behaviour perceived to be undesirable from the standpoint of one regime in international law may be justifiable by reference to another regime. It is by acknowledging various viewpoints that the motivations of the actors in the international law arena can be understood. It is only at this stage that international law can evolve. For IIL, understanding varied perspectives, including that of human rights, can assist the regime to create an appropriate balance between FDI and other State interests that may be constrained by IIL. The repetition of the

same debate from the NIEO indicates that the balance between investment flows and the national interest has not yet been achieved within the IIL regime. In short, the right to economic self-determination not only alters how a State's actions in IIL are viewed, it also provides a mechanism by which States, through the political acts of their populations, can protect their national interests in pursuit of a more nuanced IIL regime.